Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Developing a Unified Intercarrier Compensation Regime	)	Docket No. CC 01-92
	)	
	)	

THE REPLY COMMENT OF THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

The Pennsylvania Public Utility Commission (PaPUC) files this Reply Comment in response to the Federal Communication Commission's (FCC) Order released November 20, 2006 (the "Reply Comment Order").

The Reply Comment Order extended the deadline for filing a Reply Comment to January 11, 2007. On November 17, 2006, however, NARUC filed a motion requesting an extension of the reply comment date to February 2, 2007.[1] NARUC states that given the number, length, and variety of initial comments, the extension would serve the public interest by ensuring state commissions' continued full participation.

Overview

Preliminary Observations. The PaPUC appreciates the opportunity to file this Reply Comment.

[1] Motion of the National Association of Regulatory Utility Commissioners for Extension of Time, CC Docket No. 01-92 (filed November 17, 2006) (NARUC Motion).

The PaPUC Reply Comment should not be construed as binding on the PaPUC in any proceeding before the PaPUC nor the views of any PaPUC Commissioner or group of Commissioners. The Reply Comment could change in response to subsequent events including review of filed Comments, subsequent filings in this docket, or further developments under state and federal law.

The PaPUC supports the comments questioning the FCC's legal authority to preempt intrastate access rates. The PaPUC questions the need for such a complex plan to perpetuate revenues for Track 2 and Track 3 companies at the expense of consumers in Track 1 service territories. The PaPUC questions the wisdom of deregulating transit and special access when tariffing those services under a cost-based approach may represent a better way of supporting interstate access reforms.

The PaPUC challenges the wisdom and legality of limiting due process on the Plan revisions set forth in a series of e*x parte* presentations. The PaPUC suggests that a better approach might be reissuing those presentations in a formal notice seeking additional Comment and Reply Comment.

The PaPUC is not indifferent to the costs of service and deploying a modern network in thinly populated rural areas served by rural carriers. The PaPUC suggests that the FCC should convene a working group to more closely study this matter with a view to developing concrete proposals that ensure rate and service comparability between rural and urban areas as required by Section 254(g).

In the alternative, the FCC should carefully craft a result that limits interstate reform recovery to as a universal service cost. A net recipient carrier should be limited to the ARMIS-based rate of recovery for the Track 1 carrier in their respective state. A net recipient carrier's receipt of any reform support should be conditioned on the express waiver of any Section 251(f) rights. Moreover, the FCC should continue the "one POI per LATA" rule although the FCC should also permit rural carriers that rely on tandem connections in or beyond any given LATA to establish a "one POI per service territory in the LATA" rule. This modification ensures that rural carriers do not have to absorb the cost of carrying traffic to or from their network to the tandem connection used by a wireless carrier.

Discussion

Legal Authority to Preempt the States on Intrastate Access Rates. The PaPUC shares the concern of comments questioning the FCC's authority to preempt state power over intrastate carrier access rates.

The PaPUC offers the following considerations in addition to those set out in the PaPUC's previously filed comment questioning the FCC's purported authority to preempt. The PaPUC especially notes Sections 251(b)(5), Section 252(d)(2), Section 152(b) and Section 201(b) as well the universal service mandate of Section 254.

Section 251(b)(5) requires a local exchange carrier to establish reciprocal compensation arrangements for the exchange of local traffic. Section 252(d)(2) requires state commissions to establish reciprocal compensation arrangements that are just and reasonable but prohibits bans

on arrangements for the mutual recovery of costs through mechanisms such as bill-and-keep arrangements. Sections 152(b) and 201(b) collectively prohibit the FCC from exercising authority over intrastate communications unless the FCC is expressly permitted to reach an intrastate communications matter under federal law. Section 254 expressly imposed a universal service mandate on the state and federal agencies previously implied under the Communications Act of 1934.

For the reasons set forth in more detail below, none of these provisions expressly relied on by comments in support of preemption give the FCC the authority to reach intrastate communications matters generally or intrastate access rates specifically. Both precedent and legislative history support this conclusion.

Sections 251(b)(5) and Section 252(d). Sections 251 and Section 252 establish the conditions that state commissions must meet when deciding on the negotiation, approval, interpretation, and enforcement of interconnection agreements designed to foster competition in the market for local service. Section 251(b)(5) addresses the compensation between telecommunications carriers using reciprocal compensation for the transport and termination of calls not otherwise subject to access charges. Section 251(b)(5) does not include jurisdiction over intrastate access rates because access charges for intrastate long distance or interstate long distance service is distinct from reciprocal compensation for local service.

Section 252(d)(2)(A) requires that when making those determinations, for the purpose of incumbent LEC compliance with section 251(b)(5), a state commission cannot consider the terms and conditions for reciprocal compensation to be just and reasonable unless such terms and conditions: (i)

provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier and (ii) determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls. Section 252(d)(2)(B) further provides that the language in section 252(d)(2)(A) shall not be construed to preclude arrangements that afford the mutual recovery of costs through the offsetting of reciprocal obligations, including arrangements that waive mutual recovery (such as bill-and-keep arrangements).

The courts interpreted these provisions in *Southwestern Bell Telephone Co. v. Public Utility Commission of Texas,* 208 F.3d 475 (5th Cir. 2000*)(SBC v. Texas)*. In that decision, the court ruled that the state authority under 47 U.S.C. §§ 251, 252 to approve or disapprove interconnection agreements among local exchange carriers was plenary and included the authority to interpret and enforce provisions already approved by the state commission. *SBC v. Texas,* 208 F.3d 479. The court's use of "plenary" in describing the state commission's authority over interconnection agreement is not accidental. The court further recognized that the FCC's authority over interstate matters was equally plenary even though the court rejected the view that communications could be neatly divided into discrete interstate and intrastate baskets. *SBC v. Texas,* 208 F.2d 480. The court recognized the intertwining nature of communications and agreed with the Supreme Court and the FCC that state commission authority over interconnection agreements includes interstate and intrastate matters. *SBC v. Texas,* 480 F.3d 480. The court also noted that, in its grant of authority to state commissions, § 252 does not confine state commissions to the analysis of a few narrow technical points, but allows consideration of such open-ended

factors as "the public interest, convenience, and necessity" under 47 U.S.C. § 252(e)(2)(A)(ii). *SBC v. Texas,* 308 F.3d 488, n. 6. Equally important, the federal courts do not overturn these determinations unless they are arbitrary and capricious or unsupported by substantial evidence. *SBC v. Texas,* 308 F.2d 485.

The PaPUC's decisions on interconnection agreements involving reciprocal compensation are distinct from matters such as intrastate access rate reforms. The PaPUC's decisions have been competitively neutral under Section 253(b) and consistent with the public interest, convenience, and necessity requirements of Section 252(e)(2)(A)(ii).

There is no showing that the PaPUC refused to act under Section 252(e)(2), that the PaPUC's determinations are inconsistent with these requirements, or that the PaPUC willingly surrendered jurisdiction to the FCC.

Moreover, if the FCC somehow concludes that its authority includes intrastate access rates and the courts uphold that determination, the *SBC v. Texas* decision holds that a state commission is not automatically deprived of authority to address interstate matters if intrastate access rates somehow transform into a matter of federal law.[2]

A more recent federal court decision on Section 251(b) in *Global NAPS, Inc. v. Verizon New England, Inc.*, 444 F.3d 59 (1st Cir. 2006) (*Global NAPS)* supports the *SBC v. Texas* view that the FCC lacks authority to preempt the states.

[2] The substantive issue before the court involved a state commission determination that Internet calls were local calls subject to reciprocal compensation. That substantive issue was subsequently determined to be interstate in nature. The court's disposition of the substantive issue, however, was without prejudice to the overall view of state-federal relations.

In *Global NAPS,* the court recognized that there are two basic forms of preemption. The first is preemption under the Supremacy Clause of the Constitution and the *Louisiana v. FCC,* 476 U.S. 355, 368, 90 L.Ed.2d 369 (1986) (*Louisiana)* decision. Under this approach, Congress can expressly preempt a state or the FCC can preempt so long as it has the authority to address the subject matter. *Global NAPS,* 444 F.3d 71. The *Global NAPS* court discussed but did not rely on this approach. Instead, the court relied on the second approach.

The second approach allows the FCC to preempt if the subject matter is within the FCC's express authority. Under this approach, the FCC could preempt state authority but sometimes refrains from doing so. However, any preemption must be clearly expressed to convince the court. *Global NAPS,* 444 F.3d 71 citing *Qwest v. Scott,* 380 F.3d 367, 372 (8th Cir. 2004). When evaluating preemption under this approach, the courts do not uphold preemption unless it is very clearly articulated. This requirement is particularly instructive when preemption constitutes a departure from long-standing precedent. *Global NAPS,* 444 F.3d at 72-73.

The *Global NAPS* court rejected the claim that the FCC preempted state commissions from exercising their jurisdiction over intrastate access rates for non-local ISP calls using VNXX arrangements. The court ruled that the FCC's preemption on interstate access to the Internet set out in the *ISP Remand Order* did not include a preemption of state authority to impose intrastate access rates for non-local ISP calls involving VNXX arrangements. The FCC failed to clearly include that component within the scope of the *ISP Remand Order* although the matter was within the FCC's interstate authority. 444 F.3d at 71-73.

An addition consideration is a very recent federal court decision affirming the states' collective authority over intrastate rate communications under the Telecommunications Act of 1996. *Comcast IP Phone v. Missouri Public Service Commission, Case No. 06-4233-CV-C-NKL (W.D. MO January 28, 2007) (Comcast IP Phone).* In *Comcast IP Phone,* the court recognized a lack of certainty about comprehensive rules on Internet Protocol (IP) telephony. However, for purposes of intrastate preemption, the *Comcast IP Phone* decision ruled that there was a clear Congressional intent to allow states to regulate intrastate telecommunications. *Comcast IP Phone,* p. 5.

The *Comcast IP Phone* court concluded that Congress never intended federal law to preempt state regulation of intrastate communications services. *Comcast IP Phone,* pp. 5-6. State authority over intrastate communications services encompasses the authority over establishing intrastate compensation rates for intrastate communications services. This includes intrastate access rates preempted under the Missoula Plan.

The PaPUC respectfully suggests that the proposed preemption of state authority to set intrastate access rates relies on the same faulty preemption logic rejected by the *Comcast IP Phone* court. In this case, as in that decision, the FCC apparently lacks the authority to preempt intrastate communications services. That holding is likely applicable when, as here, a state or the FCC can separate interstate communications from intrastate communications. *Comcast IP Phone,* p. 8.

These decisions stand for the collective proposition that preemption occurs only if there is clear Congressional authority to preempt the state and, if that authority is clearly expressed, the FCC clearly acts. Moreover, the matter must not be a matter subject to state regulation under federal law. There is no clear Congressional authority to preempt the state commissions

from establishing intrastate access rates for intrastate communications. But, even if there were, the FCC has not clearly expressed that intention nor is that action consistent with federal law. The proposed preemption clearly departs from precedent and law.

The FCC recognizes that its Congressional grant of authority to preempt state authority over intrastate access rates, as supported by comments on the Missoula Plan, is not clearly expressed. The FCC's NPRM concedes as much in at least three areas.

Paragraph ¶63 of the Intercarrier Compensation FNPRM notes that intercarrier compensation reforms must "comply with the statutory provisions governing intercarrier compensation, such as sections 251(b)(5) and 252(d)(2) of the Act" and that ". . .any unified regime requires reform of intrastate access charges, which are subject to state jurisdiction." In paragraph ¶35, the FCC specifies that "[a]ny proposal that contemplates reform of intrastate mechanisms . . . must include an explanation of the Commission's legal authority to implement the proposal." Finally, paragraph 79 recognizes the incongruity of Congress' express concern about disruption to the interstate mechanism and its accompanying silence on the intrastate mechanism. This frank recognition of the FCC's ambiguous authority and Congress' incongruity on the issue of intrastate access rates is consistent with the FCC's prior holding in Paragraph 37, n. 66 of the *ISP Remand Order* in which the FCC did not include jurisdiction over parallel intrastate access rates as part of its solution to the problem of compensation for Internet access in local calling areas.

This ambiguity and incongruity demonstrates that the FCC's power to preempt state authority to establish intrastate access rates is not clearly established as required the *Louisiana* decision and other federal caselaw.

Louisana, 476 U.S. 355 (1986); *Global NAPS,* 444 F.3d 71-73. The courts require Congress to clearly express an intention to preempt state authority on a subject matter in order to bring it within a federal agency's purview. Since the FCC's preemption power is not expressed, the FCC lacks power to preempt the state commissions on the matter of intrastate state access rates.

Alternatively, some preemption comments rely on §251(b)(5) and extend the FCC's use of reciprocal compensation under 251(b)(5) to include intrastate access rates. Proponents take this approach because Congress neglected to include language limiting the term "telecommunications" in that provision.

However, the FCC's reach on §251(b)(5) encompasses only compensation arrangements as they apply to LECs carrying local traffic. *See* First Report and Order, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 16008-58 ¶¶ 1027-1118 (1996) (*Local Competition Order*) (adopting reciprocal compensation rules and creating a compensation scheme for the exchange of competitive local traffic).

The FCC's approach to Section 251(b)(5) never included intrastate access rates until most recently. When the FCC did so, it acted in furtherance of Internet access, which the FCC concluded was an interstate matter. The FCC reached reciprocal compensation under Section 251(b)(5) but only for the very limited purpose of preventing arbitrage for Internet calls because the problem of arbitrage for interstate Internet access now extended to local calling areas.

The federal court decision in *Global NAPS* upheld that approach when ruling that the FCC's failure to expressly include VNXX arrangements within the scope of its interstate authority over Internet access did not

preempt state authority to set intrastate access rates for VNXX arrangements. *Global NAPS,* 444 F.3d 71-73.

The FCC's approach to Section 251(b)(5) also excludes traffic that is subject to parallel intrastate access regulations. The FCC's decision on Internet access was a decision based on its interstate authority and not any intrastate authority. That is evident in the Paragraph 37, n. 66 of the *ISP Remand Order* as well as the language excluding parallel intrastate access rates:

> [b]efore Congress enacted the 1996 Act, LECs provided access services to IXCs and to information service providers in order to connect calls that travel to points - both interstate and intrastate - beyond the local exchange. In turn, both the Commission and the states had in place access regimes applicable to this traffic, which they have continued to modify over time. It makes sense that Congress did not intend to disrupt these pre-existing relationships. Accordingly, Congress excluded all such access traffic from the purview of section 251(b)(5). [3]

The preemption comments cannot invoke the FCC's very limited reach in decisions involving interstate access to the Internet and the resulting reciprocal compensation to support their conclusion. The FCC acted in furtherance of an interstate issue. The FCC expressly excluded parallel intrastate access rates when making that decision. A decision to exclude parallel intrastate access rates cannot be supported in support of the FCC's power to now reach those same parallel intrastate access rates.

Sections 152(b) and 201(b). Some preemption comments next resort to Sections 152(b) and §201(b) of TA-96 to support preemption even though

[3] *ISP Remand Order* at 9168, ¶37

there is no clear Congressional mandate authorizing preemption of the states.

Section 152(b) provides a very detailed list of those provisions that authorize the FCC to reach intrastate matters although none of those detailed provisions expressly mention intrastate access rates. Importantly, Title VI, Section 601 accompanying the list set out in Section 152(b) contains a further prohibition against construing the provisions to modify, impair or supercede state or law unless expressly provided. Section 201(b) grants the FCC broad rulemaking authority to "prescribe such rules and regulation as may be necessary in the public interest to carry out the provisions of this Act" although that general authority must be balanced against the Section 152(b) limitation.

The comments rely on an overly broad public interest component of Section 201(b) that must be read with the Supreme Court's decision in *AT&T Corp. v. Iowa Utilities Bd.,* 525 U.S.366, 377-86 (1999) (*Iowa Utilities Board*). The *Iowa Utilities Board* decision prohibits the FCC from regulating any aspect of intrastate communications that is not governed by provisions inserted into federal law on the theory that such aspect of intrastate communications has ancillary effect on matters within the FCC's primary jurisdiction. The *Iowa Utilities Board* also recognized that Section 152(b) does not give the FCC jurisdiction to address the prices that incumbent local exchange carriers may charge their new competitors for interconnection, unbundled access, and resale, which are services and facilities that will enable them to provide competing local telecommunications services.

In short, the holding in the *Louisiana-Iowa Utilities Board* line of decisions by the Supreme Court recognizes that Sections 152(b) and §201(b) extend the FCC's authority beyond jurisdictionally interstate matters to

"encompass matters that, before 1996, fell within the exclusive jurisdiction of the states" in very limited circumstances.

The comments fails to show that intrastate access rates are expressly included in the provisions of TA-96 extending the FCC's authority in some limited intrastate matters. For this reason, the FCC must reject comments concluding that the FCC can invoke that specific authority in support of some general preemption power to include state authority to establish intrastate access rates.

The courts' refusal to imply the authority to modify a state's authority over matters not expressly included, in this case intrastate access rates, is entirely consistent with the Supreme Court's decision in *Louisiana.* The *Louisiana* decision specifically held that Section 201(b) does not give the FCC authority to set intrastate depreciation rates. The Supreme Court's decision in the *Louisiana* case relied on the view that authority not expressly granted cannot be implied. In the decision, the Supreme Court rejected the FCC's attempt to preempt intrastate depreciation rates in the absence of express statutory authority. The court specifically rejected arguments that the FCC should be able to preempt in order to foster some general federal policy:

> While it is certainly true . . . State regulation will be displaced to the extent that it stands as an obstacle to [Congress' objectives], . . . it is also true that a federal agency may pre-empt state law only when and if it is acting within the scope of its congressionally delegated authority. . . . First, an agency literally has no power to act, let alone pre-empt . . . a sovereign State, unless and until Congress confers power upon it. Second, the best way of determining whether Congress intended the regulations . . . to displace state law is to examine the nature and scope of the authority granted . . . . Section 152(b) constitutes . . . a congressional denial of power to the FCC to require state commissions to follow FCC depreciation practices . . . we simply cannot accept an argument that the FCC may nevertheless take

> action which it thinks will best effectuate a federal policy. An agency may not confer power upon itself. To permit an agency to expand its power in the face of a congressional limitation on its jurisdiction would be to grant to the agency power to override Congress. This we are both unwilling and unable to do.
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> *Id.*

The Supreme Court refusal in *Iowa Utilities Board* to abandon the *Louisiana* analysis on the scope of federal authority is also instructive. The *Louisiana* decision prohibited federal regulation on intrastate depreciation rates. Although the proponents of preemption ask the FCC to reach intrastate access rates on some general theory of preemption, neither the Congress nor the Court disturbed the prior *Louisiana* determination that the FCC cannot administratively overturn federal law and precedent that preserves state authority.

Moreover, Section 601 of Title VI in Section 152(b) prohibits the FCC from implying any authority to reach matters under state or local law unless expressed provided for in TA-96. The proponents' suggestion that the FCC can preempt the state authority to set intrastate access rates constitutes an implied extension of authority to modify existing state law on intrastate access rates in violation of Section 601. There is no express provision giving the FCC the power to preempt state authority to establish intrastate access rates and Section 601 prohibits the FCC from implying one.

Section 152(b) and 251(b)(5). To overcome the express Title VI, Section 601 limit on the FCC's authority under Sections 152(b) and 201(b), the comments in support of preemption combine the authority of §201(b) with an "expansive" language interpretation of §251(b)(5). This combination of Section 201(b) and 251(b)(5) is suggested to buttress the conclusion that the

FCC has, and must, exercise the power to preempt state authority to establish intrastate access rates.

Again, the court decisions do not support that approach. The *Iowa Utilities Board, Global NAPS,* and *Louisiana* line of cases hold that preemption must be clearly expressed by Congress and that it cannot be implied or inferred from law. There is no clear expression of FCC power to preempt the states' authority to set intrastate access rates in Section 201(b). This is particularly true given that Section 251(b)(5) addresses reciprocal compensation for local exchange service as opposed to the intrastate access rate regimes in place in the states for intrastate long distance service.

The FCC recognizes as much by soliciting comments on what legal theory could support preemption of state authority to set intrastate access rates. There would be no need to identify some ambiguous or implied power to preempt state authority if that power was clearly expressed. Since it is not, the comments are trying to convince the FCC that the law can be ignored in support of a plan that places surcharge burdens on consumers in net contributor states.

This supports the view of other comments that Congress never expressly granted the FCC the power to preempt state authority over intrastate access rates. Comments relying on general principles of law cannot overcome this reality. The comments' expansive interpretation of FCC authority cannot mask the absence of any express power to preempt state authority over a traditional intrastate subject like access rates.

The PaPUC agrees with those comments challenging the expansive interpretation because they contradict Section 201(b). The PaPUC agrees that "the Commission's authority to preempt the States under §201 falls only to those matters to which the 1996 Act applies, and jurisdiction over

intrastate access charges was not changed under the 1996 Act." *Initial Comments of the National Association of Regulatory Commissioners*, CC Docket No. 01-92 (filed May 24, 2006) (hereinafter "NARUC Initial Comments").

The NARUC approach correctly recognizes that 47 U.S.C. §152(b) provides that "nothing in this Act shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier engaged . . ." The NARUC approach is consistent with the Supreme Court's observation in *Iowa Utilities* "that [i]nsofar as Congress has remained silent, however, §152(b) continues to function." *Iowa Utilities Bd.,* 525 U.S. at 381 n.8.

Congress was not silent on local calling issues. Congress was silent on the FCC's authority to set intrastate access rates. An expansive interpretation cannot correct that silence. Consequently, the FCC cannot preempt state authority to set intrastate access rates under Sections 152(b) and 201(b) in conjunction with Section 251(b)(5). The Congress' silence on this amalgamation of power brings it well within the limits of the *Iowa Utilities Board* decision and the prohibition in Section 601 against implying an authority that does not clearly exist in order to preempt state or local laws.

This suggests that the FCC has very limited preemption power and no power to preempt state authority over intrastate access rates. The FCC should refrain from expanding its regulatory power to reach the states' authority to establish intrastate access rates in the absence of a clear federal mandate. The TA-96 did give the FCC new, albeit limited, authority to reach some intrastate communications but that expansion did not expressly include

state authority over intrastate access rates. *See, e.g.*, 47 U.S.C. §§223–7, §332 exceptions listed in §152.

Moreover, any reliance in the comments on the general public interest language in Section 201(b) should be read in conjunction with the state's authority to set reciprocal compensation rates under Section 251(b). This requires balancing that language against states' independent authority to promote important state interests, so long as they are competitively neutral, under Section 253(b).

Reliance on the general provision of Section 201(b) can occur only by implying that Section 201(b) trumps the detailed and specific public interest provisions of Sections 252 and Section 253. Such an implied emphasis to overturn a specific state public interest authority can be accomplished only by an expansion of federal authority that violates the Title VI, Section 601 limitation. An implication is necessary because there is no statutory provision or caselaw supporting a view that the general public interest provision of Section 201(b) expressly trumps the detailed and specific public interest requirements of Sections 252(e)(5) and 253(d).

Prior FCC Preemption Precedent and Universal Service in Section 254. Other comments rely on FCC preemption precedent or Section 254 provisions governing universal service to support preemption. The earlier FCC decisions do not take an expansive view of their preemption authority in federal-state matters. This reluctance is particularly evident in Sections 252(e)(5) and Section 253(d) determinations.

The FCC refused to take an "expansive" approach to preemption with regard to a state failing to act under section 252(e)(5). The FCC precedent recognizes that its Section 253(d) preemption authority does not include a

state's competitively neutral requirement under Section 253(b) even if that requirement might otherwise violate Section 253(a). This approach should govern Section 152(b) and Section 201(b).

The PaPUC recognizes that additional arguments for preemption have been found in 47 U.S.C. §254, the Universal Service provisions of the 1996 Act. For example, the ICF originally urged the FCC to preempt state authority to set intrastate access charges because they are "inconsistent" with the Commission's duty to "rationalize universal service support."

This interpretation, however, ignores judicial precedent. The courts have ruled that Section 254 represents a joint federal-state system that does not provide the FCC with authority to preempt the states. *See Qwest v. FCC,* 258 F.3d 1191, 1203 (10th Cir. 2001); *Texas Office of Public Utility Counsel v. FCC,* 183 F.3d 393, 423-24 (5th Cir. 1999).

In *Texas Office of Public Utility Counsel*, the court held that the universal service provisions of Section 254 were not sufficiently unambiguous or straightforward enough to override the reservation of state authority of intrastate access charges under
Section 152(b). 183 F.3d at 424. Additionally, because of the limitations on the Commission's authority after the 1996 Act, the 5th Circuit "held that the Commission may not consider intrastate revenues in assessing a carrier's contribution to the federal universal service-support mechanism." *Id.* at 447-48. Likewise, in the recent decision of *Qwest v. FCC*, the court rejected the FCC's argument that the general provisions of Section 254 require the Commission to order states to terminate implicit subsidies in favor of explicit universal service programs and held that Section 254 does not provide "a backdoor to federal manipulation of state support mechanisms." *Quest*, 258 F.3d at 1232-33. Thus at least two circuit courts ruled that Section 254 does

not provide any power to preempt the States' authority to establish intrastate access rates.

This is an important consideration for Pennsylvania. Any preemption of PaPUC authority will prevent further reformation of our intrastate access rates and that preemption directly involves our state support mechanism. Federal preemption cannot be sustained if it creates a backdoor manipulation of our state support mechanism under the *Qwest* decision. Moreover, preemption cannot impose additional surcharge costs on Pennsylvania consumers in support of reforms in states or regions that have not undertaken reforms to the extent they are in place in Pennsylvania and the surrounding MACRUC states.

The "Impossibility" Exception Under *Louisiana.* Other preemption comments encourage the FCC to preempt the states under the "impossibility" exception set forth in footnote 4 of *Louisiana PSC.* That footnote permits "FCC pre-emption of state regulation…where it was *not* possible to separate the interstate and the intrastate components of the asserted FCC regulation." 476 U.S. at 376 n.4.

That exception is inapplicable here. The FCC noted in its *ISP Remand Order* that ongoing industry changes made it increasingly difficult to separate interstate and intrastate Internet-access traffic, citing developments such as voice over Internet protocol (VoIP). The inability to identify actual geographic location for Internet-access purposes was the justification for preempting state regulation of VoIP. However, the FCC acknowledged the intrastate-interstate division of VoIP traffic in its decision assessing the revenues of "interconnected VoIP" providers. The FCC also acknowledged that traffic studies can be utilized for ascertaining the associated division of

VoIP intrastate and interstate revenues for the purpose of producing the requisite federal and state universal service fund contribution assessments.[4]

There was never an issue about any alleged technological change that makes identification of intrastate access traffic so difficult as to constitute an exception under this precedent. The FCC's Intercarrier Compensation docket identifies no impossibility.

The only difference between the situation then and today is the Missoula Plan proponents' desire to include intrastate access rates. They seek preemption to implement reforms in states where reform is minimal and at the expense of states were reforms are already in place.

Administrative and Economic Efficiency. Considerations of administrative and economic efficiencies do not support FCC power to preempt state authority to establish intrastate access rates. Carriers are historically and consistently able to separate intrastate access voice service. For example, interconnection agreements between CMRS providers and LECs regularly establish traffic factors by mutual agreement.

Importantly, as indicated above, the TA-96 does not expressly give the FCC the power to preempt state authority to manage intrastate access rate regimes in furtherance of some particular proponents' version of appropriate intercarrier compensation reform.

The FCC's power to address intrastate local calling, a traditional matter within a state's intrastate authority, does not expressly include intrastate access rates. The preemption proponents present no facts or legal

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[4] *In re Universal Service Contribution Methodology, et al.*, WC Docket No. 06-122 *et al.*, (FCC June 27, 2006), Report and Order and Notice of Proposed Rulemaking, FCC 06-94, ¶¶ 53-58, at 27-30.

conclusion supporting the view that Pennsylvania's difficult and expensive reforms constitute a failure to implement federal law under Section 252(e)(5) or that our policies contravene Section 253(b). There is also no evidence that Pennsylvania failed to implement the universal service mandates of Section 254. Finally, Sections 251(b)(5) and 253(d)(2), as well as the provisions of Sections 152(b) and 201(b), do not grant the FCC an express power to preempt Pennsylvania's determination to reforms its local and intrastate rate structures in conformity with state and federal law.

For all these reasons, the PaPUC urges the FCC to proceed very cautiously when considering preemption of state authority to set intrastate access rates under TA-96.

Substantive Issues in the Comments.

The Need for Cost-Based Rates for Transit and Special Access Services. The comments of the cable trade association, NCTA, oppose the Plan because it disadvantages competitive providers by ensuring revenues for incumbent carriers. The NCTA particularly supports cost-based transit service and urges the FCC to address the rights and obligations of VoIP providers. Time-Warner concludes that the Plan is fundamentally flawed because it perpetuates revenue recovery for ILECs, and rural carriers in particular, instead of a solution that is technologically and carrier neutral.

The PaPUC agrees with these comments to the extent that these comments underscore the need for a cost-based approach to transit and special access services. These services are critical to reform of the interstate

access system in a manner that keeps access to these services publicly known and at tariffed rates.

The need for a cost-based and tariff-based approach to these services is particularly important given the recent GAO study questioning the viability of competitive alternatives to special access. If special access is a problem area, the PaPUC identifies no detailed market data in the Comments to its Missoula Plan suggesting that transit service is any different from special access service.

The PaPUC again urges the FCC to seriously consider a tariff approach to these interstate services since whatever costs the FCC attempts to reform are more easily recovered through a mark-up to tariffed services as opposed to an assessment on interstate revenues from the private contracts that will replace tariff prices for these same services.

The Need for Rate Uniformity and Avoidance of Customer Surcharges. The PaPUC shares the concern of comments, such as those of the Ad Hoc Telecommunications Users Committee and NASUCA, that the FCC should consider a uniform rate approach. The FCC should not adopt a plan that perpetuates revenue recovery for carriers, particularly rural carriers, by imposing surcharges to protect switched access revenues.

The PaPUC supports the comments to the extent that they share the PaPUC's initial concern that rate differences on a Track basis may simply substitute rate arbitrage for services with rate arbitrage by Tracks. The main problem is that price signals of different rates will invariably result in structures or devices that avoid a higher rate in favor of lower rates. The PaPUC is particularly concerned that perpetuation of rate variations to solve a rate variation problem will perpetuate rate arbitrage.

The PaPUC agrees with comments to the extent that they recognize the need to expand the contribution source for universal service purposes. An expanded universal service base, however, should not be translated to an expanded contribution base for ensuring revenue recovery for interstate access rate reforms for rural carriers that are exempt under Section 251(f).

The problem with this approach is that insulated rural carriers receive dedicated revenue streams from many contributors such as cable, wireless, and VoIP providers, even though they may never collect from this access revenue insurance fund.

The PaPUC is particularly concerned about the FCC's ability to legally mandate this access revenue insurance fund separate and distinct from universal service. That is because the FCC's authority to mandate where revenues are placed appears to be limited to portable universal service and this proposed access revenue insurance fund is not portable in contravention of relevant provisions of TA-96.

The PaPUC also shares the concerns of competitors and public interest groups about funding this access revenue insurance program from end-user surcharges. The PaPUC notes the National Association of State Utility Advocates (NASUCA) observation that there is no guarantee that the $6.9 Billion in rate increases identified to support $6 Billion in rate reforms will ever flow through to end-user consumers, e.g., through reduced intrastate and interstate long distance rates.

The PaPUC questions the ability to insure the flow-through of rate reforms given the experience with the CALLS and MAGS programs. They imposed surcharges to reduce rates although the rate reductions were never specifically identified or tracked for many carriers.

The PaPUC also shares Verizon's concern that the Plan unreasonably insulates Track 2 and Track 3 carriers from competition while providing them revenue streams from higher access rates and surcharge support. The PaPUC agrees with Verizon that the plan as proposed will perpetuate, not eliminate, rate arbitrage. The PaPUC also shares the concern that the plan does not address VoIP compensation nor does it adequately define or justify the Restructure Mechanism.

The PaPUC shares the concerns of all parties about the wisdom of insulating rural carriers from competition even as customers pay surcharges to perpetuate the revenues of carriers with Section 251(f) protections from competition.

However, the PaPUC disagrees with comments that dismiss the impact that cost-of-service and economies of scale play in rural carrier service territory. The PaPUC also agrees with rural carriers that these considerations make some forms of competition more difficult than others in those areas.

Consequently, the FCC could consider an approach in which support from any properly sized and correctly calculated interstate reform fund is conditioned on costs. The carrier's support be based on a return no greater than that set out in the ARMIS-based interstate rate of return of the largest Track 1 contributing carrier in their state. Any carrier recipient should forgo any Section 251(f) relief it may have under federal law. These three conditions should be the minimum considered in developing any interstate access fund and only if it does not preempt state authority over intrastate rates.

The "One POI per LATA" Rule for Wireless. As noted above, any FCC reform of interstate access rates should be cost-based, calculated according to

the ARMIS-based return of the largest Track 1 carrier in the recipient carrier's state, and require waiver of any Section 251(f) rights as a condition for receiving that support. Moreover, given the comments concern about the need for cost-based transit and special access service, the reform should continue a tariff approach to these services and they should be cost-based as noted by the comments of some wireline, wireless and cable providers.

The PaPUC shares the wireless concern, for the reasons set out above, that the transit service and tandem proposals could create a regime that ends up allowing carriers to charge whatever the market will bear for these deregulated services. The PaPUC also shares the wireless concern that the current Edge proposal gives ILECs an improper advantage over transport and transit services. The PaPUC also agrees with Verizon Wireless that the Plan could mandate direct connection, which is not the case today, and impose additional costs on wireless carriers that would ultimately be reflected in rates.

For these reasons, the PaPUC urges the FCC to adopt a modified "one POI per LATA" rule with a "one POI per LATA for each carrier service territory" approach.

Under this approach, there should be one POI per service territory in every LATA. The PaPUC suggests this approach because the "one POI per LATA" rule, if adopted, will require rural carriers to absorb the cost of transporting traffic from their edge to the tandem where the wireless carrier is interconnected. This approach unintentionally imposes an unnecessary cost on rural carriers.

If the FCC adopts an approach in which reforms are premised on cost for transit and special access services and the revenues recovered are calculated according to a return which is no higher than the ARMIS-based

rate of the largest Track 1 carrier, rural carriers should not be required to absorb the additional "edge to tandem" costs while they are also opening their markets to competition.

The Rural Carriers. As set out above, the PaPUC shares the concern of some rural Pennsylvania carriers about the "one POI per LATA" rule to preserve wireless service territories. The PaPUC suggests, for the reasons set out above, that a better approach may be a "one POI per service territory in a LATA" rule. The PaPUC suggests this rule because, otherwise, rural carriers bear the cost to transport traffic from their "edge" to the wireless POI typically located in Verizon's tandem.

The Missoula Plan Letter. In January 2007, just a few days prior to the February 1, 2007 deadline for filing these Reply Comments, the Missoula Plan proponents generated a limited-circulation analysis detailing the putative benefits of the Missoula Plan. The Missoula Plan supporters filed a version of this limited-circulation document as a Letter with the FCC on January 30, 2007 (the *January Letter*). For the reasons set out below, the PaPUC urges the FCC to classify the *January Letter* as a new filing subject to further Notice and Comment.

The Cover Letter accompanying the *January Letter* makes several statements that warrant clarification from the PaPUC's perspective. Pennsylvania was an interested state commission that was formulated after the submission of Comments.

The PaPUC was not asked to work with Missoula Plan supporters, did not submit work for, or actively participate in development of the *January Letter* proposals. The PaPUC does not dispute that deliberative process and,

at the same time, understands that interested state commissions supporting the Missoula Plan would limit interaction to the proponents.

Consequently, several considerations warrant clarification. First, all interested state commissions were not in the discussions leading to the *January Letter*. Second, all interested state commissions were not asked to opine on the results nor the criteria leading to the results. Third, all interested state commissions were not asked to approve or disapprove the *January Letter* results. Finally, all interested state commissions were not aware of the final *January Letter* results before the January 30, 2007 filing.

In addition, the PaPUC specifically refrained from requiring our carriers to participate on our behalf in the information-gathering work that industry supporters asked the PaPUC to perform. The PaPUC did so in order to avoid litigation about state law provisions addressing the PaPUC's ability to impose reporting obligations.

Also, Paragraph 3 of the Cover Letter proposes a Federal Benchmark Mechanism (FBM) to compensate states for rates that exceed a $20 (Low Benchmark) to $25 (High Benchmark) range. The Cover Letter explains that this was to "ensure that all areas with early adopted initiatives receive support."

This is not entirely accurate for Pennsylvania. Pennsylvania has a policy which developed over 10 years and results in an approach that blends access rate decreases, local rates increases, and a state universal service fund. This cost in excess of $1 Billion since 1996. This $1 Billion figure does not include ancillary local rate rebalancing as well.

In addition, Paragraph 4 of the Cover Letter states that the Missoula Plan proponents "already discussed the Federal Benchmark Mechanism

proposal with state commissioners and staff members and those commissions that approved this proposal are signatories to this letter."

The PaPUC is unaware of any formal discussion process or panel convened with all interested state commissioners and staff members. Episodic conversations and infrequent conference calls involving some states should not be construed as discussions. This is particularly true for states that filed Comments identifying serious reservations with, or outright opposition to, the Missoula Plan.

Again, the PaPUC does not challenge the supporters' deliberative process. Rather, the PaPUC seeks to clarify statements about the deliberative process in order to place those statements in context.

The FBM proposal set out in the *January Letter* and attachments, however, further appears to provide the greatest benefit to states that focused largely on universal service funds or local rates increases. The FBM proposal does not benefit states, like Pennsylvania, where reform was accomplished through a combination of universal service funding, local rate increases, and access rate decreases in support of a lower benchmark affordability rate.

The proposed FBM also hopes to adequately compensate states with rural populations. However, the $20 to $25 FBM does not address situations like Pennsylvania. Pennsylvania established alternative affordability mechanisms based on a detailed and thorough investigation of the local conditions in their respective states. Pennsylvania is a state with one of the largest number of rural citizens. An FBM acceptable to a few states is not necessarily a good benchmark for all 50 states.

Pennsylvania's long-standing universal service policy has a "high cost" benchmark of $18 for basic local residential service. The proposed FBM does

not address these kinds of benchmarks. The FBM does not support lower benchmarks based on a state commission's knowledge of local impacts. The PaPUC understands and appreciates the desire to ameliorate total cost impact. However, an amelioration that increases end-user rates and Pennsylvania's net contributor role is a major concern to the PaPUC because of penetration and affordability.

The PaPUC is also concerned about the continuing lack of compensation for states, like Pennsylvania, that pursued a blending of universal service, local rate increases, and access rate decreases. Those blended results fall outside a proposal that compensates states which chose to focus reforms largely on local rates or access rates. A federal benchmark set higher than Pennsylvania's $18 benchmark effectively penalizes Pennsylvania and other states for taking a blended approach.

That is apparent because Pennsylvania could get more FBM funding if Pennsylvania kept rural access rates very high (since the FBM will now pay to lower high access rates) or if Pennsylvania increased local rates but failed to create a universal service fund (since the FBM compensates high-end local rates). Pennsylvania could also get more compensation if Pennsylvania kept universal service costs below $10 million (as opposed to $33 million) because the FBM limits state USF compensation to $10 million.

The PaPUC is concerned about an FBM proposal that picks policy winners and losers with the support of a few states years after implementation. In essence, early adopters that are net contributors to the federal USF are penalized, not rewarded, because they failed to anticipate what a few interstate reform advocates would suggest years later.

The PaPUC is also concerned about the "Model Results" contained in the *January Letter*. In the Model Results, Pennsylvania and other states in

the Middle Atlantic region are urged to agree that a $.38 increase in a federal USF assessment on telephone numbers in their states generates more benefits than detriments in their respective states. A cursory analysis shows that that some states in the Middle Atlantic that are net contributors to federal reform and universal service efforts, like the District of Columbia, Maryland, and Delaware, will pay even more than they get back.

The PaPUC is concerned because states in our Middle Atlantic region, and Pennsylvania in particular, pay far more into current universal service programs than they receive in net benefits. The Missoula Plan aggravates that reality by advocating a reform that provides revenue assurances to incumbent carriers in response to competitive changes by imposing more costs on Pennsylvania's end-users.

This remains so notwithstanding the alleged $.70 benefit per line attributable to Pennsylvania in the *January Letter*. Those putative benefits could, particularly in rural areas where consumers continue to use switching to access the internet, be rapidly consumed. That is because the Missoula Plan establishes internet compensation rates in Section II.E.8.

The PaPUC also notes that the Model Results analysis contained in the *January Letter* were obtained by non-supporting states on January 30th or January 31st depending on their access to state commissions or other supporters of the *January Letter*. This short notice prevented a comprehensive and more thorough analysis of the alleged costs and benefits.

The *January Letter* also raises new concerns in Pennsylvania about the net contributor role Pennsylvania's end-users play in supporting current federal universal service efforts. For example, Figure 1.12 of the 2006 Universal Service Monitoring Report (*2006 USF Report)* shows that Pennsylvania paid $125.976, 000 dollars more into the universal service fund

more than Pennsylvania. This contribution occurred even though Table 3.20 of the *2006 USF Report* shows that Pennsylvania's access lines declined from 8,385,507 in 2000 to 7,345,084 in 2004. While a portion of this decline is attributable to wireless substitution, the access line decline occurred along with a decline in Pennsylvania's overall penetration rate from 97.8% in 2001 to 97.2% in 2005, although this statistic captures the widespread of wireless and "other" telephone services.

The PaPUC urges the FCC to recognize the net impact of additional end-user surcharges particularly the increases proposed in the Missoula Plan. The PaPUC makes this request given the apparent decline in penetration rates and our ongoing contribution to federal efforts. This ongoing contribution and penetration rate decline arose during the time that the FCC imposed other surcharges to implement the CALLS and MAG proposals aimed at reforming interstate access. Those reforms were supposed to benefit end-user customers although the reforms increased the overall cost of intrastate communications service for most end-users.

Now, the PaPUC is concerned that the new end-user surcharge increases defended as acceptable in the *January Letter* will aggravate Pennsylvania's net contributor role and accelerate the decline in telephone penetration rates. This would be particularly true if, as occurred with the earlier interstate reform proposals, the ratification of reform proposals results in surcharges that lack any oversight mechanism to ensure that the benefits are flowed through to the majority of end-users.

Finally, the PaPUC agrees with the MACRUC Reply Comment supporting a new Comment and Reply Comment period. The PaPUC also suggests that states or industry supporters of the Missoula Plan proposal consider some kind of a forum, perhaps under the auspices of NARUC since

NARUC takes no official position on the Missoula Plan, to convene a representative panel for examining concerns with, and alternatives to, the Missoula Plan.

For these reasons, the PaPUC urges the FCC to conclude that the *January Letter* contains significant information and revisions. As such, the *January Letter* must be subject to a Comment and Reply Comment period. The FCC took that approach with the Phantom Traffic ex parte presentation in the Missoula Plan. That approach provides due process and avoids adoption of a proposal in an arbitrary and capricious fashion.

Pennsylvania Impact. The PaPUC questions the need to create an access revenue insurance fund for rural carriers that is supported almost exclusively from an assessment on consumers in net contributor states. The PaPUC is also concerned about the ability to ensure that any reforms are actually passed through to consumers in the form of lower calling rates in response to reformed interstate access rates.

The PaPUC is concerned that any revenue losses for these interstate reforms may become an exogenous event for rural carriers under Pennsylvania law. This means that those access rate reforms could be subject to a recovery claim under Pennsylvania's price-cap regime. That means the potential for significant rate increases for rural customers above and beyond those normally imposed on consumers under state law.

Finally, the PaPUC is concerned about modifications to the Missoula Plan that modify the Early Adopter Fund (EAF) and Restructure Mechanism (RM) components set out in the original filing. These modifications reduce the size of these funds to trim the costs of reform. The end result is a new "rate band" approach that grants a large portion of the support to others

while denying Pennsylvania recovery for $1 billion dollars in previous intrastate access rate reforms.

The PaPUC does not agree with this result. The PaPUC does not agree that these are minor adjustments to an existing proposal. The PaPAC believes that these modifications are actually an entirely new proposal that should be subject to a full comment and reply period.

For these reasons, the PaPUC recommends that the FCC reject the current Missoula Plan. The PaPUC also suggests that the FCC republish all the filed modifications as a new proposal and establish new comment periods.

Otherwise, the combination of cost increases and denial of a due process opportunity to comment on the details contained in these new proposals are virtually certain to result in contentious litigation.

Respectfully submitted,
Pennsylvania Public Utility Commission

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